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No. 77-521

In the Supreme Court of the United States

OCTOBER TERM, 1977

GENERAL MOTORS CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM OF PETITIONER GENERAL MOTORS CORPORATION

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The Brief in Opposition resorts to the familiar device of arguing that petitioner seeks review of the application of settled summary judgment principles to particular facts. The Brief in Opposition also asserts that the decision below has not adopted a "*per se* rule" and "states no rule of general applicability" that warrants review (Opp. at 12). Both arguments are wrong and require this brief Reply. As we demonstrated in our Petition for Certiorari, this case squarely presents an important question of statutory interpretation that will effectively determine the scope of the motor vehicle recall provisions of the National Traffic and Motor Vehicle Safety Act of 1966, as amended ("Safety Act"), 15 U.S.C. § 1381 *et seq.*

And, contrary to the Solicitor General's suggestion that this case will have no impact on other Safety Act cases, the court of appeals and the Justice Department itself are already treating the decision below as a decision having *per se* application and preclusive precedential significance on the issue of "unreasonable risk." [1]

1. The government has not challenged our statement (Pet. 13-14), based on the legislative history of the Safety Act, that by enacting the "unreasonable risk" standard, Congress intended that motor vehicle recall orders would be issued only after balancing the safety considerations against the costs of compliance in each case. But by adopting a *per se* rule that precludes a manufacturer from introducing evidence on the presence or absence of risk, the court of appeals has in effect reweighed the competing policy interests previously considered by Congress and substituted its own judgment as to the proper outcome by reading the "unreasonable risk" standard out of the statute. The action of the court of appeals exceeds the limits of the judicial role and warrants review by this Court.[2]

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[1] The submissions of *amici* in support of the Petition, which the government ignores, amply demonstrate that the effects of the decision below will be felt not only by the major domestic manufacturers, but by all members of the motor vehicle industry. Many smaller firms in the industry may not be able to afford the costs of the substantial expansion of their recall-and-repair obligations threatened by the court of appeals' decision.

[2] Apparently recognizing that the court of appeals completely ignored the balancing required by the Act, the government seeks to strike its own balance by suggesting that the costs of recall would be negligible. Thus, the respondents argue that "it was *inferrable* that the defect [in the vehicles at issue in this case] was readily correctable . . ." (Opp. at 13; emphasis added). Neither NHTSA nor either court below drew such an inference from the record. Such an inference cannot and should not be drawn for the first time in this Court. Evidence on the costs of recall is not of record, but it is in fact "inferrable" that recall of the vehicles in question would be unusually difficult because of the many practical problems engendered by the extreme age of these 1959-60 cars.

The Brief in Opposition attempts to obscure the court of appeals' revision of the statute by defending the court's result on factual grounds. In doing so, respondents apparently feel compelled to recite and rely upon their version of the facts developed at trial—after the district court had correctly held that the presence or absence of an unreasonable risk "was a matter of fact, not of supposition" (App. D, p. 45a). Thus, what respondents are really urging, although their argument purports to defend a grant of summary judgment, is that the result in this case is justifiable on the basis of the whole record. But the district court found to the contrary, and the court of appeals did not undertake a review of the whole record; rather, it held the entire trial record to be immaterial. Had the court of appeals rested its decision on the whole record, the nature and scope of its review would of necessity have been very different. (*See*, the dissenting opinion of Leventhal, J., App., p. 24a; Rule 52(a), Fed. R. Civ. P.)

2. Contrary to respondents' suggestion, the decision below already has had and will continue to have great precedential force in Safety Act cases. Unless corrected by this Court, the holding below will operate to exclude evidence on the "unreasonable risk" issue in virtually all subsequent Safety Act litigation, and the government is urging that result in other cases. As the dissenting judge correctly forecast, the holding below is so disturbing precisely because of "the doctrine [it] establish[es] for governance of this type of case in the future . . ." (App. A, p. 34a).

In the very next Safety Act case to reach the court of appeals after the instant case,[3] the court concluded that

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[3] Respondent has conceded by silence, as it must, that virtually all Safety Act cases arise in the D.C. Circuit. Under these circumstances, where there is no possibility that a conflict among the circuits will arise, review by this Court is appropriate. *See Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938); Pet. 18-19.

another type of defect in other vehicles presented a *per se* unreasonable risk under the Safety Act and observed that, "[i]ndeed, this conclusion appears to be mandated by our recent decision in [the *Pitman Arm* case]. . . ." [4] The Justice Department argued strenuously for that result, notwithstanding the Solicitor General's assertion in this Court that the decision below is *sui generis* and without general applicability. The Justice Department has in fact argued in several other pending Safety Act cases that the holding below is controlling on the issue of "unreasonable risk." [5] And while arguing in this Court that "the court of appeals has not adopted a '*per se* rule' precluding a manufacturer from introducing evidence on the question whether a known defect related to 'motor vehicle safety' within the meaning of the Safety Act" (Opp. at 12), the Justice Department is even now pressing the opposite interpretation in the lower courts.[6]

3. The use to which the courts and the Justice Department have already put the decision below wholly belies

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[4] *United States* v. *General Motors Corp.*, —— F.2d ——, D.C. Cir., Nos. 76-1744 and 76-1745 (*"Quadrajet"*), decided Oct. 14, 1977, slip. op. at 5, *aff'g in relevant part a grant of summary judgment to the government in* 417 F. Supp. 933 (D.D.C. 1976).

[5] In *United States* v. *Ford Motor Co.*, D.C. Cir. Nos. 76-2062 and 76-2063, argued Nov. 21, 1977, *on appeal from* 421 F. Supp. 1239 (D.D.C. 1976), the Department of Justice moved, on the basis of the holding in this case, that the court of appeals summarily affirm another district court decision in which summary judgment was entered against a manufacturer which had not been permitted to introduce evidence on the issue of risk. A similar motion was filed in the *Quadrajet* case, *supra*, n.4.

[6] For example, in *United States* v. *Ford Motor Co.*, C.A. No. 76-0029, another Safety Act case still pending before the United States District Court for the District of Columbia, the Justice Department has again moved for summary judgment and has argued that, by its holdings in this case and *Quadrajet*, the court of appeals has "adopt[ed] *in toto* the *per se* approach to vehicle defects that the government has advanced since the outset of this litigation." Plaintiff's Reply to the Opposition of Defendant Ford Motor Company to Plaintiff's Motion for Summary Judgment, filed Oct. 21, 1977, at 3.

the argument advanced by the government against review of this case by this Court. It is clear that the court of appeals' decision, if permitted to stand, will fundamentally change the nature of the evidentiary record compiled in all subsequent motor vehicle recall litigation and foreclose any meaningful review of administrative defect determinations. This means, as we have already pointed out (Pet. 15-16), that the record in subsequent cases will not be sufficiently developed for effective appellate review. Thus, if the scope Congress intended the Safety Act to have is ever to be determined on a fully developed record that raises all pertinent conflicting considerations, this is the case in which to do it.

CONCLUSION

For the reasons stated in the Petition and this Reply, the Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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